

## **EFFECTIVE DEATH PENALTY AND POST CONVICTION REFORM AMENDMENTS (10/25/07 DRAFT)**

**PURPOSE:** The proposed constitutional and statutory amendments will restore the Post-Conviction Remedies Act's ideal balance between providing convicted persons with a generous opportunity to seek relief for serious constitutional errors in their convictions or sentences and giving to the State and crime victims the finality and closure to which they are entitled. Particularly in death-penalty cases, they will streamline the post-conviction, post-appeal review process and end abusive practices that have made the delay in those cases acute.

### **BACKGROUND:**

**Overview:** In the past ten years, the review process in death-penalty cases has slowed to a crawl. The problem is especially acute in the review that begins after a capital conviction and death sentence have been affirmed on direct appeal. State funding for counsel and litigation expenses intended to speed review at both the state and federal levels instead has slowed that review, and, in one case, has brought it to a halt. In addition, Utah Supreme Court decisions have impaired the use of procedural bar and time bar rules to streamline the state review. Those decisions also have opened the door to full merits review in the federal courts in cases where the State should have been able to argue that merits review is foreclosed by the petitioner's procedural defaults in the State court. This causes further delay at the federal level. None of these delays facilitate review of serious issues about a petitioner's innocence: a claim that the State never has and never would argue is beyond the courts' authority to address.

### **Process:**

**TRIAL:** The United States Constitution and the Utah Constitution guarantee all persons charged with a crime the right to a jury trial, along with other attendant rights designed to assure fairness and prevent convicting and imprisoning innocent persons. U.S. Const. Amend. 6; Utah Const. Art. 1, § 12. Indigent defendants have a federal constitutional right to taxpayer funds for counsel and for litigation expenses, such as investigators and expert witnesses, to defend against criminal charges.

**FIRST REVIEW LEVEL:** After the trial ends, the Utah Constitution further creates the right for a convicted person to appeal his conviction and sentence. Utah Const. Art. I, § 12. Although the United States Constitution creates no right to an appeal in State court, it does give indigent defendants the right to taxpayer funds to prosecute the appeal when, as in Utah, the state creates the right to appeal.

**SECOND REVIEW LEVEL:** If the appellate court affirms the conviction and sentence on direct appeal, the criminal case ends. However, the review process

does not. At that point, the convicted person may begin the post-conviction review process. Even though the process is a review of a criminal conviction and sentence, this process is civil. The convicted person is the equivalent of a civil plaintiff suing the State for relief from the conviction and sentence. He bears the burden of proof and the responsibility to move the case forward.

Both the State and the federal government have post-conviction review remedies. Generally, a convicted person begins the process in State district court. Either party may appeal the outcome to the appropriate state appellate court.

**THIRD REVIEW LEVEL:** If the state district and appellate courts affirm the conviction and sentence, the convicted person may begin the process over in the federal courts. He begins by filing a petition for relief in the United States District Court for the District of Utah. Either party may appeal the outcome to the United States Court of Appeals for the Tenth Circuit.

**The present problem:** In theory, the review should become narrower and swifter as this process progresses. That is, a convicted person generally should not be allowed to seek post-conviction relief on claims that he raised and lost in the criminal process. He should not be allowed to seek relief on claims that he could have, but did not raise in that process unless he can show that his counsel's failure to raise them fell below federal constitutional standards. He should not be allowed to file untimely claims challenging a conviction or sentence based on alleged errors that raise no serious issue about his factual innocence.

In order to assure that the system of post-conviction review worked as it should, the Legislature, in 1996, passed the Post-Conviction Remedies Act. The Act was designed to strike an ideal balance between the State's and victims' interest in the finality of convictions and sentences, and a reasonable opportunity for the convicted person to obtain relief based on overlooked, serious constitutional errors or newly discovered evidence that calls the conviction or sentence into doubt.

However, that balance has been upset. In *Gardner v. Galetka*, 2004 UT 42, 94 P.3d 263, the Utah Supreme Court held that it had state constitutional authority for post-conviction review of a criminal conviction and sentence independent of the Post-Conviction Remedies Act. That holding circumvented the limitations imposed by the Post-Conviction remedies. Through that holding, the Utah Supreme Court reinstated its broad, common law rules that impose little restriction on a petitioner's ability to raise claims that should have been raised in the original criminal proceedings, or even in a first round of post-conviction review. Further, those rules are so broad that federal courts have begun to reach the merits of claims that should have been deemed procedurally defaulted and not subject to merits review. This, of course, causes additional delay at the federal level.

In *Adams v. State*, 2005 UT 62, 123 P.3d 400, the Utah Supreme Court effectively neutralized the Legislature's time-bar. Under *Adams*, a convicted person may avoid the time bar if his claim is sufficiently meritorious no matter how long he delays in bringing it and even though it raises no serious issue about his factual innocence.

Finally, in *Menzies v. Galetka*, 2006 UT 81, 150 P.3d 480, the supreme court held that the legislature intended the statutory right to appointed counsel for indigent petitioners in death-penalty post-conviction cases to incorporate a right to the effective assistance of counsel that is co-extensive with the Sixth and Fourteenth Amendment rights that the petitioner already enjoyed during the criminal process. The supreme court relied on that newly created right to send Menzies' post-conviction case back to its by then eleven-year-old starting point. The court took this action without requiring Menzies to show that his post-conviction counsel's negligence actually harmed Menzies in any way.

The proposed constitutional and statutory amendments below: 1) clarify that the Utah Constitution does not give courts unlimited constitutional authority for post-conviction review of a criminal conviction or sentence; 2) clarify that any such review is permissible only as provided by statute; and 3) restore the balance struck in 1996 between the State's and victims' interests in finality and the convicted person's interests in a remedy. In addition, they reaffirm the availability of a remedy for timely challenges to a criminal conviction or sentence based on overlooked, serious constitutional errors; newly discovered evidence that calls the conviction or sentence into serious doubt; or factual innocence. On the other side of the scale, by limiting procedural- and time-bar exceptions to those permitted by statute, they curtail the ability of convicted persons to engage in abusive litigation by bringing multiple and repetitive post-conviction actions, cut-off the right to a remedy for non-innocence based challenges to the conviction after a reasonable opportunity to seek relief, and limit the procedural bar and time bar exceptions to matters that will not open the door to full merits review in federal court.

## **PROPOSED AMENDMENTS, WITH ANNOTATIONS**

### **Utah Const. Art. VIII, § 3, Jurisdiction of Supreme Court:**

The Supreme Court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States. The Supreme Court shall have appellate jurisdiction over all other matters to be exercised as provided by statute, and power to issue all writs and orders necessary for the exercise of the Supreme Court's jurisdiction or the complete determination of any cause. The Supreme Court's jurisdiction to collaterally review criminal convictions and sentences shall be exercised as limited by statute.

**Utah Const. Art. VIII, § 5, Jurisdiction of district court and other courts --  
Right of appeal:**

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause. The jurisdiction of all courts to collaterally review criminal convictions and sentences shall be exercised as limited by statute.

**Utah Code Ann. § 78-35a-102. Replacement of prior remedies**

(1) Title 78, chapter 35a establishes a the sole substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal except as provided in Subsection (2). This chapter replaces all prior remedies for such review, including extraordinary or common law writs. Proceedings under this chapter are civil and are governed by the rules of civil procedure. Procedural provisions for filing and commencement of a petition are found in Rule 65C, Utah Rules of Civil Procedure.

(2) This chapter does not apply to:

- (a) habeas corpus petitions that do not challenge a conviction or sentence for a criminal offense;
- (b) motions to correct a sentence pursuant to Rule 22(e), Utah Rules of Criminal Procedure; or
- (c) actions taken by the Board of Pardons and Parole.

**Utah Code Ann. § 78-35a-104. Grounds for relief – Retroactivity of rule.**

(1) Unless precluded by Section 78-35a-106 or 78-35a-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:

- (a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;

(b) the conviction was obtained or the sentence was imposed under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;

(c) the sentence was imposed ~~in an unlawful manner~~ or probation was revoked in ~~an unlawful manner~~ violation of the controlling statutory provisions;

(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution; ~~or~~

(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:

(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;

(ii) the material evidence is not merely cumulative of evidence that was known;

(iii) the material evidence is not merely impeachment evidence; and

(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received; or

(f) the petitioner can prove that he is entitled to relief under a rule announced by the United States Supreme Court, the Utah Supreme Court, or the Utah Court of Appeals after his conviction and sentence became final on direct appeal; provided, however, that he shall not be entitled to relief under that rule unless he can establish that:

(a) the rule was dictated by precedent existing at the time that petitioner's conviction or sentence became final; or

(b) the rule decriminalizes private, primary conduct or prohibits a category of punishment for a specific class of persons; or

(c) the rule is a watershed rule of criminal procedure that implicates the fundamental fairness and accuracy of the criminal proceeding, as defined by United States Supreme Court authority.

~~(2) The question of whether a petitioner is entitled to the benefit of a rule announced by the United States Supreme Court, Utah Supreme Court, or Utah Court of Appeals after the petitioner's conviction became final shall be governed by applicable state and federal principles of retroactivity.~~

(2) The court shall not grant relief from a conviction or sentence unless the petitioner establishes that there would be a reasonable likelihood of a more favorable outcome in light of the facts proved in the post-conviction proceeding, viewed with the evidence and facts introduced at trial or during sentencing.

(3) The Court shall not grant relief from a conviction based on a claim that the petitioner is innocent of the crime for which he was convicted except as provided in sections 78-35a-301, et. seq., or 78-35a-401, et. seq.

#### **— ANNOTATIONS:**

The amendment in subsection (1)(f) adopts the federal common law rule for granting relief based on changes in the law. In effect, it precludes a petitioner from relying on an argument to change the law as a basis for seeking relief from a conviction or sentence that already have been affirmed on direct appeal.

The amendment in subsection (2) makes clear that the petitioner cannot get relief from a conviction or sentence based on technical errors that had no real effect on his conviction or sentence.

The amendment to subsection (3) removes claims of factual innocence from the limitations imposed on all other claims under these provisions. The State has no interest in continuing to punish a person who did not commit the crime for which they were convicted no matter how much time has passed and no matter how many other petitions they have filed.

Sections 78-35a-401, et. seq., is proposed legislation that provides a separate remedy for innocence claims. If it does not pass, subsection (3) will have to be changed to remove the reference.

#### **Utah Code Ann. § 78-35a-105. Burden of proof**

(1) The petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.

(2) The court shall not enter a default judgment against the State. The court shall not grant relief without determining that the petitioner is entitled to relief under the provisions of this chapter and in light of the entire record, including the record

from the criminal case under review.

(3) The respondent has the burden of pleading any ground of preclusion under Section 78-35a-106, but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence.

**ANNOTATION:** The amendment in subsection (2) conforms to federal common law.

**Utah Code Ann. § 78-35a-106. Preclusion of relief--Exception**

(1) A person is not eligible for relief under this chapter upon any ground that:

- (a) may still be raised on direct appeal or by a post-trial motion;
- (b) was raised or addressed at trial or on appeal;
- (c) could have been but was not raised at trial or on appeal;
- (d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or
- (e) is barred by the limitation period established in Section 78-35a-107.

(2) The State's failure to plead or argue any procedural bar or time bar will not waive the bar; rather, the State may waive any of the procedural bars or the time bar only by written notice filed in the action and served on the petitioner. Otherwise, the State may raise any of the procedural bars or time bar at any time, including on a State's appeal from an order granting post-conviction relief. In addition, any court may raise any procedural bar or time bar on its own motion, provided that it gives the parties notice and an opportunity to be heard.

(3) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a the basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel.

**ANNOTATION:** The amendment in subsection (2) will prevent unintentional waivers of procedural- and time-bar defenses. This provision will prevent petitioners from obtaining windfall merits review of claims that should be procedurally- or time-barred. This amendment is particularly important in complex cases with lengthy petitions.

**Utah Code Ann. § 78-35a-107. Statute of limitations for post-conviction relief.**

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed; ~~or~~

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based; or

(f) the date on which the new rule described in 78-35a-104(1)(f) is established.

(3) The limitations period is tolled for any period during which the petitioner was prevented from filing his petition due to State action in violation of the United States Constitution, or due to physical or mental incapacity. The petitioner has the burden of proving by a preponderance of the evidence that he is entitled to relief under this subsection. If the court finds that the interests of justice require, a court may excuse a petitioner's failure to file within the time limitations.

(4) Sections 78-12-35 and 78-12-40 do not extend the limitations period established in this section.

**ANNOTATION:** The amendment in subsection (3) overrules the Utah Supreme Court's decision in *Adams v. State*, 2005 UT 62, 123 P.3d 400, discussed above, and substitutes the federal equitable tolling rule for the "interests of justice" exception. It excuses an untimely filing only under circumstances where there is a valid excuse for the delay. As stated above, other provisions remove from this

limitation any claim of factual innocence. A petitioner may obtain relief from his conviction at any time if he can prove his innocence.

**Utah Code Ann. § 78-35a-108. Effect of granting relief--Notice**

(1) If the court grants the petitioner's request for relief, it shall either:

(a) modify the original conviction or sentence; or

(b) vacate the original conviction or sentence and order a new trial or sentencing proceeding as appropriate.

(2)(a) If the petitioner is serving a felony sentence, the order shall be stayed for five days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial or sentencing proceedings, appeal the order, or take no action.

(b) If the respondent fails to provide notice or gives notice at any time during the stay period that it intends to take no action, the court shall lift the stay and deliver the order to the custodian of the petitioner.

(c) If the respondent gives notice that it intends to appeal the court's decision, the stay provided for by subsection (2)(a) shall remain in effect until the appeal concludes, including any petitions for rehearing or for discretionary review by a higher court. The court may lift the stay if the petitioner can make the showing required for a certificate of probable cause under Utah Code Ann. § 77-20-10 and Utah R. Crim. P. 27.

(e)(d) If the respondent gives notice that it intends to retry or resentence the petitioner, the trial court may order any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary.

**Utah Code Ann. §c78-35a-109. Appointment of pro bono counsel**

(1) If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.

(2) In determining whether to appoint counsel, the court shall consider the following factors:

(a) whether the petition contains factual allegations that will require an evidentiary hearing; and

(b) whether the petition or the appeal involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(3) An allegation that counsel appointed under this section was ineffective cannot be the basis for relief in any subsequent post-conviction petition.

**Utah Code Ann. § 78-35a-202. Appointment and payment of counsel in death penalty cases**

(1) A person who has been sentenced to death and whose conviction and sentence has been affirmed on appeal shall be advised in open court, on the record, in a hearing scheduled no less than 30 days prior to the signing of the death warrant, of the provisions of this chapter allowing challenges to the conviction and death sentence and the appointment of counsel for indigent ~~defendants~~ petitioners.

(2)(a) If a ~~defendant~~ petitioner requests the court to appoint counsel, the court shall determine whether the ~~defendant~~ petitioner is indigent and make findings on the record regarding the ~~defendant's~~ petitioner's indigency~~e~~. If the court finds that the ~~defendant~~ petitioner is indigent, it shall, subject to the provisions of subsection (5), promptly appoint counsel who is qualified to represent ~~defendants~~ petitioners in post-conviction death penalty cases as required by Rule 8 of the Utah Rules of Criminal Procedure. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.

(b) A ~~defendant~~ petitioner who wishes to reject the offer of counsel shall be advised on the record by the court of the consequences of the rejection before the court may accept the rejection.

(3) Attorney fees and ~~Costs of counsel and other reasonable~~ litigation expenses incurred in providing the representation provided for in this section and that the Court has determined are reasonable shall be paid from state funds by the Division of Finance according to rules established pursuant to Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(a) In determining whether the requested funds are reasonable, the Court should consider:

(i) the extent to which petitioner requests funds to investigate and develop evidence and legal arguments that duplicate the evidence presented and arguments raised in the criminal proceeding; and

(ii) whether petitioner has established that the requested funds are necessary to develop evidence and legal arguments that are reasonably likely to support post-conviction relief.

(b) The Court may authorize payment of attorney fees at a rate of \$125 per hour up to a maximum of \$60,000. The Court may exceed the maximum only upon a showing of good cause as established in subsections (e) and (f).

(c) The Court may authorize litigation expenses up to a maximum of \$20,000. The Court may exceed the maximum only upon a showing of good cause as established in subsections (e) and (f).

(d) The Court may authorize the petitioner to apply *ex parte* for the funds permitted in subsections (b) and (c) upon a motion to proceed *ex parte* and if the petitioner establishes the need for confidentiality. The motion to proceed *ex parte* must be served on counsel representing the State, and the Court may not grant the motion without giving the State an opportunity to respond.

(e) In determining whether good cause exists to exceed the maximum sums established in subsections (b) and (c), the Court must consider:

(i) the extent to which the work done to date and the further work identified by petitioner duplicates work and investigation performed during the criminal case under review; and

(ii) whether petitioner has established that the work done to date and the further work identified is reasonably likely to develop evidence or legal arguments that will entitle the petitioner to post-conviction relief.

(f) The Court may permit payment in excess of the maximum amounts established in subsections (b) and (c) only on petitioner's motion, provided that:

(i) if the Court has granted a motion to file *ex parte* applications under subsection (3)(d), petitioner must serve the motion to exceed the maximum amounts on an assistant attorney general employed in a division other than the one in which the attorney is employed who represents the State in the post-conviction case; if the Court has not granted a motion to file *ex parte* applications, then petitioner must serve the attorney representing the state in the post-conviction matter with the motion to exceed the maximum funds; and

(ii) if the motion proceeds under subsection (f)(i), the designated assistant attorney general shall not disclose to the attorney representing the State in the post-conviction matter any material the petitioner provides in support of the motion

except upon a determination by the Court that the material is not protected by or that petitioner has waived the attorney client privilege or work product doctrine; and

(iii) the Court gives the State an opportunity to respond to the request for funds in excess of the maximum amounts provided in subsections (b) and (c).

(4) Nothing in this act shall be construed as creating the right to the effective assistance of post-conviction counsel and no relief granted shall be granted on any claim that post-conviction counsel was ineffective.

(5) If within sixty days of the request for counsel the court cannot find counsel willing to accept the appointment, the court must so notify the petitioner and the State's counsel in writing. In that event, the petitioner may elect to proceed *pro se* by serving written notice of that election on the court and State's counsel within thirty days of the court's notice that no counsel could be found. If within thirty days of its notice to petitioner the court receives no notice that the petitioner elects to proceed *pro se*, the court shall dismiss any pending post-conviction actions and vacate any execution stays, and the State may initiate proceedings under Utah Code Ann. § 77-19-9 to issue an execution warrant.

#### **ANNOTATIONS:**

The amendments in subsection (3) address an ongoing complaint by the post-conviction plaintiff's bar that the funds permitted under the present administrative rules are insufficient. Further, the original purpose of providing for funded review in death-penalty post-conviction review was to give Utah the advantage of expedited federal review. The proposed amendments bring Utah's compensation structure into closer compliance with the proposed federal regulations for meeting the prerequisites for expedited federal review.

The proposed amendments also provide criteria for the courts to apply in assessing whether to exceed the maximum amounts. They are designed to give death-sentenced post-conviction petitioners a fair opportunity to raise legitimate claims while safe-guarding against abusive, wasteful, and duplicative litigation.

The amendments in subsection (4) overrule the Utah Supreme Court's decision in *Menzies v. Galetka* to preclude using the rule adopted in that case to postpone execution indefinitely. Another death-row inmate, Douglas Carter, has argued that the right recognized in *Menzies* requires the state courts to consider a second post-conviction petition on its merits because prior post-conviction counsel was ineffective. If accepted, Carter's argument would mean that he and anyone else sentenced to death could avoid execution indefinitely by filing endless post-

conviction petitions, each time arguing that counsel in the previous post-conviction action was ineffective.

The amendment in subsection (5) will allow a case to go forward when all attorneys refuse to accept an appointment under this section. As presently written, when the death-sentenced petitioner asks for counsel for the post-conviction action, the district court must appoint counsel. If no counsel will accept the case, then the case cannot go forward. This is the present situation in the *Menzies* case. Nothing has happened in that case for nearly a year because all qualified counsel have refused to accept the appointment. This amendment requires the court to resolve the stalemate and force the case to proceed with the petitioner representing himself or be dismissed.